IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 159 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
MAGANBHAI DHULABHAI VANKAR & ORS

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Appearance :
MR KC SHAH APP for Appellant
MR ASHISH M DAGLI for Opponents

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 21/02/2007

ORAL JUDGMENT :(Per : HONOURABLE MR.JUSTICE J.R.VORA)

1 This Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by Additional Sessions Judge, Sabarkantha at Himmatnagar, on 14th of July, 2004, in Sessions Case No. 189 of 2003, whereby all the eight respondents herein came to be acquitted by the learned Trial Court for the offences punishable under Sections 436, 147, 148 of the Indian Penal Code as well as under Section 135 of the Bombay Police Act.

2 After preliminary hearing of both the sides i.e. Learned APP Mr. K.C. Shah for the State and learned Advocate Mr. A.M. Dagli for all the respondents, Leave to Appeal is granted and Appeal is Admitted. Learned Advocate Mr. Dagli waives on behalf of all the eight respondents - original accused.

3 Both the learned Advocates i.e. learned APP Mr K.C. Shah and learned Advocate Mr. Dagli requested the Court to take up the matter as the matter is old and they undertake to equip this Court with all necessary papers and the Record and Proceedings are called for from the Trial Court which is also available with this Court. Request made is granted and the matter is heard finally.

4 The facts reveal that the complaint of the incident

came to be filed by one Jasubhai Valjibhai Sadat of village Bhavanpur, Taluka – Bhiloda, before PSI Dilipsinh Momaiya Jadeja of Vijaynagar, on 8th of March, 2002, which was registered at Shamlaji Police Station by PSO Savjibhai. According to the complaint filed on 8th of March, 2002 that at the relevant juncture, on the day of the incident i.e. on 2.3.2002, complainant was serving as a Cook in Sahyog Hotel and on account of communal disturbance, Sahyog Hotel was closed on 28th of February, 2002. This hotel is owned by a partnership firm and one of the partners is Shabbirbhai Habibbhai. On account of communal disturbance, the citizens and servants belong to Muslim community had abandoned the hotel. On the day of incident, partner Babubhai and the complainant were present in the hotel. On 2ndt of March, 2002, at about 00.30 hours, suddenly a crowd of 400 to 500 persons came to the hotel shouting and started pelting stones. The persons of the crowd disconnected the electric connection and entering in the hotel, this crowd damaged the furniture of Sahyog Hotel and the hotel was put to fire. This complaint was registered at Shamlaji Police Station vide Crime Register No. I-40/2002. After registration of complaint, concerned PSI Jadeja investigated the said crime and draw the panchnamas and recorded the statements of the witnesses. Further investigation was also carried out by PSI S.P. Patel on account of transfer of earlier Investigating Officer. Ultimately, against eight respondents, a charge sheet came to be filed for the above said offences in the Court of learned Judicial

Magistrate, First Class, at Bhiloda. The case was committed to the Court of Sessions as the learned Magistrate had no jurisdiction to try the said offences.

5 The charge against all the eight respondents was framed by the Trial Court for the above said offences vide Exhibit-3 on 11th of June, 2004 and each of the eight respondents pleaded not guilty and, therefore, the prosecution examined as many as eight witnesses and produced on record necessary documents like First Information Report, panchnama of scene of offence and copy of the Notification issued under the Bombay Police Act. Ultimately, after hearing the parties, a short judgment came to be delivered by the learned Trial Judge and in para-9 it is stated that on account of Godhra carnage the present incident occurred on 2nd of March, 2002 at 0.30 hours near village Bhavanpur at Sahyog Hotel and the Hotel was put to fire. The prosecution examined eight witnesses and none of them, except police witnesses, supported the prosecution version nor any of the witnesses identified the accused before the Court and as such prosecution could not establish the case against the respondents accused beyond doubt and, therefore, all the accused came to be acquitted for the above above charges.

6 Learned APP Mr. K.C. Shah vehemently argued that though the witnesses have not supported the prosecution case, but having regard to the investigation and for which Investigating Officer

Mr. Dilipsinh Momaiya Jadeja has been examined as PW-8 at Exh. 17 there is no reason to disbelieve his evidence. It is stated that the incident had occurred and there is no doubt about it. The property of hotel was damaged which is also established. It is therefore argued that the appeal is required to be allowed. While on the other hand, learned Advocate Mr. Dagli vehemently argued that this is a case of no evidence as no iota of evidence is found from the prosecution witnesses or documents produced to connect the present accused with the crime. It is submitted that though the panchas of the panchnama have turned hostile, and even if it is believed that the incident has occurred, there is no evidence on the record to connect any of the respondents with the alleged crime.

7 We have carefully gone through the contentions raised by both the sides and the record and proceedings of the Trial court. Both the learned Counsels for the parties have fully assisted this Court to dispose of the matter finally.

8 Now after dealing with the appeals against acquittal, the Apex Court has laid down the principles in the matter of AJIT SAVANT MAJAGVAI vs STATE OF KARNATAKA, as reported at (1997) 7 SCC 110, which could be beneficial to decide this Appeal and in Para-16, the Apex Court observed as under :

" 16. This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial Court. These principles have been set out in innumerable cases and may be reiterated as under:

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers, it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trialCourt, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial Court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the

opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial Court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused."

9 Accordingly, so far as the reasoning given by the Trial Court is concerned, we have already observed that the prosecution has examined eight witnesses. Out of them, except panchas, all the eye witnesses have not supported the prosecution version to the extent to identify the accused respondents to be the persons from the crowd which attacked Sahyog Hotel. However, law requires that even in acquittal appeals the court dealing with the acquittal appeals must undertake its own independent assessment of evidence and come to its own finding as has been done in appeals against the order of conviction. However, note of caution that the Apex Court sounded was with respect to the reasoning given for the acquittal. As observed above by the Apex Court in aforesaid decision, the reasons given by the Trail Court for acquittal must also be examined by the High Court and if the

findings of the High Court are different from the findings of the Trial Judge, the High Court must give reasons for discarding the grounds of acquittal as given by the Trial Court. Note of caution is also sounded that on appreciation of evidence, if a second view is possible, but unless and until the findings of the acquittal given by the Trail court are so perverse, as would not stand to reason, then only such findings may be interfered with and not merely because second view is possible from the appreciation of the same evidence. The cardinal principle which is adopted by the courts in this respect is that the view favourable to the accused must be accepted in such circumstances.

10 Therefore, before discussing the finding given by the Trial Judge in one paragraph, it would be necessary for us to assess independently the evidence recorded by the Trial Court and come to our own findings.

11 On going through the record, we have found that PW-1 Jayantibhai Dhulabhai Damor, Exh. 6, examined by the prosecution stated that at the relevant juncture he was serving as Watchman at Asopalav Hotel. He stated that the incident took place at about 1'O clock at night and a crowd came at the hotel. He stated that since there was no light, he could not say how many persons were there in the crowd. The crowd started pelting stones and therefore nephew of his employer ran away and they also concealed

themselves in jungle situated behind the hotel. When they returned, they noticed in the hotel that the hotel was put to fire and furniture was damaged. The witness categorically stated that he did not identify anybody from the crowd. He also did not know Jasubhai Valjibhai. He was declared hostile and was confronted by the prosecution with his police statement and he categorically denied that he named the respondents in his statement. PW-2 Aksarali Yakubali Lodha, Exh. 7, according to the prosecution, was an eye witness and about the incident he deposed that the incident occurred on 1st of March, 2002 at about 1.30. a.m. At that time, witness himself, Gulambhai Khoja, Hasanali Kovadiya, Pyarali Holda were present. The hotel was closed on account of communal disturbance. At the time of the incident, a crowd of 800 to 1000 persons came and attacked the hotel. He deposed that he did not know what happened thereafter. He did not see anybody from the crowd. He did not notice any thing in the hands of the crowd. Again this eye witness was also declared hostile and learned APP conducting the trial confronted him with his police statement and he stated in the cross-examination that he did not state before the police the name of any of the respondents and part played by the accused in the incident. Likewise, PW-3 Exh. 8 Hasanali Kovadiya Exh. 6, an eye witness was examined by the prosecution and stated that he was serving in Asopalav Hotel and the owner of Asopalav Hotel was Roshanali. It appears that the crowd which attacked the Sahyog Hotel also attacked Asopalav Hotel. The

witness - PW-3 stated in his deposition that Asopalav Hotel was damaged in the incident occurred on 1st of March, 2002 in the afternoon. He was not able to identify any of the accused from this crowd. He was declared hostile and denied to have stated the names of the accused before the police and part played by each of the accused. PW-4, Exh. 9 Jasubhai Valjibhai Sadat who filed First Information Report before the police stated that at the relevant juncture he was serving as a cook at Sahyog Hotel. This witness gave First Information Report before PSI Jadeja. He stated that the incident took place on 1st of March, 2002 at about 12.00 midnight and he was present in Sahyog Hotel. At the time of incident, a crowd of 1,000 persons attacked Sahyog Hotel and pelted stones and after entering the Hotel, damaged furniture and other property of the said hotel. At the time of the incident, the owner of the Hotel had been to his native place. In the same incident, one more Hotel Asopalav was also damaged by the crowd. The witness stated that in this incident he offered the complaint which was recorded at Exh. 10. No cross-examination was conducted by the defence that even in the complaint also no names of any of the respondents had been disclosed by the complainant Jasubhai Valjibhai Sadat which is evident from the complaint at Exhibit- 7. At Exhibit-11, panchnama of scene of offence is placed on record by the prosecution. At Exh. 12, a copy of the Notification under the Police Act is placed. Savjibhai Badaji is examined by the prosecution as PW-5 at Exh. 13. He was PSO in-charge of Shamlaji Police Station at the relevant

juncture and he deposed that on 8th of March, 2002, the complainant Jasubhai Valjibhai Sadat had been to Shamlaji Police Station when he was in-charge of PSO. He offered this complaint which was reduced in writing and was registered. He confirmed that it was the same complaint which was placed at Exh. 10 on the record. An entry was also made in station diary, copy of which was produced at Exh. 14. He stated that investigation was entrusted to PI Mr. Jadeja. PW-7 Rameshbhai Savjibhai Sadat is examined at Exh. 16. He is a neighbour resident of Sahyog Hotel. He stated that at the time of incident he was at his residence but not at the place of incident. He came to know about the incident only in the morning when he visited the place to fetch water. He denied that he had seen the persons who caused damage to Sahyog Hotel and put the same on fire. He admitted that the police had recorded his statement. This witness was declared as hostile and in cross-examination by the prosecution he was confronted with his police statement, in which he denied to have stated before the police that a crowd attacked Sahyog hotel, damaged it and had put the said hotel to fire. PW-8 Dilipsinh Momaiya Jadeja is the Investigating Officer and he stated that from the complaint of Jasubhai Valjibhai, investigation of the crime was entrusted to him. He draw the panchnama of Sahyog Hotel as well as of Asopalav Hotel. The said panchnama is produced at Exh. 11. He recorded the statements of the witnesses and obtained the copy of the Notification under the Bombay Police Act. He arrested the accused and arranged to send

them under court custody. Thereafter, the further investigation was made by his successor Mr. S.P. Patel, who filed the charge sheet. In chief-examination, the statement made before him by Jayantibhai Dhulabhai, Aksarali Lodha, Hasanali and Rameshbhai Sadat was read over to him and he deposed that these witnesses had stated before him the role played by the accused and their presence in the crowd at the time of committing the crime. It was alleged in the examination-in-cross that no such witnesses stated so before him and that he recorded the statements on his own.

12 This is all is the evidence of the prosecution. It appears that since there is no incriminating circumstances against any of the accused, learned Trial Judge appears not to have recorded the statements of any of the accused under Section 313 of the Code of Criminal Procedure.

13 On our independent assessment of the evidence recorded, we also come to the conclusion that so far as these eight respondents are concerned, the prosecution failed to prove the case and charge levelled against them beyond reasonable doubt. True that the eye witnesses have turned hostile and the prosecution has attempted to corroborate their statements made before the police in the evidence of the Investigating Officer Mr. Jadeja, but that piece of evidence is not sufficient to connect the accused with the crime as the said evidence is not substantive evidence. Except the

above said witnesses, there is no other circumstantial evidence or documentary or oral evidence connecting the accused with the above said crime. We, therefore, following the principles as laid down by the Apex Court in the matter of Ajit Savant Majagvai (supra) come to the same conclusion as has been reached by the Trial Judge. Though we may observe that the judgment and reasonings given by the Trial Judge is too brief as each criminal trial requires careful consideration and detailed reasons for the judicial finding. Irrespective of that, we have independently undertaken the appreciation of the evidence in detail and have considered the contentions raised by learned counsels and we have no reasons to reach to the different conclusion than reached by the Trial Judge. Therefore, we do not incline to interfere in the judgment of acquittal delivered by the learned Trial Judge, which is impugned in this Appeal.

13 In the result, this Appeal stands dismissed.

(J. R. VORA, J.)

(SHARAD D DAVE, J.)

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